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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

TRACY RAWLINGS, Plaintiff, vs. GILT EDGE FLOUR MILLS, INC., Defendant.	RESPONSE TO DEFENDANT'S MOTION TO DEPOSIT PAYMENT WITH CLERK Civil No. 1:07cv00031 DAK
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COMES NOW, Plaintiff and submits this RESPONSE MEMORANDUM TO
DEFENDANT'S MOTION TO DEPOSIT PAYMENT WITH CLERK.

ARGUMENT

1. Jurisdiction

As an initial matter, the Defendant's Motion to Deposit Payment With the Clerk should be dismissed for lack of jurisdiction. On October 28, 2008, the Plaintiff filed a Notice of Appeal,

appealing the Judgement, the Court's Order granting the Defendant's Motion to Disallow Attorney's fees, and the Court's Order simultaneously denying the Plaintiff's Rule 59 Motion, Motion for Attorney's Fees, and Motion to Certify Issue to State Supreme Court. Once the appeal is filed, jurisdiction is transferred to the Appeals court. "Ordinarily, filing notice of appeal operates to transfer jurisdiction of case from district court to Court of Appeals thus precluding district court from proceeding in any aspect of case other than to act in aid of appeal" *Macon v. Bailar*, 428 F Supp 182, (ED, VA. 1977); "Once appeal is taken, jurisdiction passes to appellate court and District Court cannot thereafter amend order appealed from without leave of Court of Appeals, except as provided by Rule 62(c)" *Turner v. HMM Pub. Co.*, 328 F2d 136, (5th Cir. 1964). This Court does not currently have jurisdiction over this matter and the Defendant's motion should therefore be dismissed.

2. *Propriety of Deposit*

Even if the District Court exercises jurisdiction over this motion, allowing the deposit now would not support the purpose of F.R.C.P. 67 and the creation of such deposits. "[the] [p]urpose of Rule 67 is to permit stakeholder in pending action, by simple preliminary motion, to deposit money in court for ultimate disposition, and thus avoid expense and delay of litigation." *United States v McDonald Grain & Seed Co.*, 135 F. Supp. 854 (Dist. ND, 1955). In the current situation, we have concluded litigation and have moved on to appeal. The purpose of this appeal is not to object to the amount awarded, but rather to the refusal to award attorneys' fees. There is no reason, then, to deposit any amount with the court as there is no question that the amounts at issue in the Defendant's Motion are owed.

Additionally, an order requiring the Plaintiff to accept the payment has the potential to compromise the currently pending appeal. It is a long-standing judicial rule that if a judgment is paid and voluntarily accepted, a judgment will be deemed satisfied and any appeal will be moot. *Sierra Nevada Mill Co. v. Keith-O'Brien Co.*, 48 Utah 12, 156 P. 943 (1916). There are exceptions to the rule, most notably that “If a judgment is entered as to one part of a controversy, which is separate and distinct from another part, and the disposition of the latter cannot affect the disposition of the former, a party may accept the money or property to which he is entitled, and not be deemed to waive his right to appeal as to other independent claims which the court refused to grant.” *Jensen v. Eddy*, 30 Utah 2d 154, 514 P.2d 1142 (1973). Defendant has argued that this is the case in the current matter, and that Plaintiff’s appeal of the denial of attorney’s fees does not affect the judgment for the Plaintiff on the substantive issues. However, the judgment presented to the District Court Judge to sign contained language awarding appeals that was lined out by the Judge prior to signing the judgment. Plaintiff has therefore been put in the position that he is appealing the judgment itself, even if only partially. Defendant cannot therefore argue that the judgment award is independently sound, as other parts of the judgment are currently being appealed.

Defendant has also argued that an Order from this Court allowing the deposit to be made with the clerk would preserve the Plaintiff’s appeal. Contrary to their claim, there is no law either supporting or denying this position. The case cited by the Defendant, *Klein v. Grynberg*, 44 F.3d 1497 (10th Cir. 1995), is not on point. In that case, the Court did not order the prevailing party to accept the partial award they received, rather the plaintiffs voluntarily but under protest chose to accept an unsatisfactory judgment on a breach of fiduciary duty claim in order to collect a satisfactory judgment on a breach of contract claim while appealing the breach of fiduciary duty

claim. The Plaintiffs were in the position where they could not accept the satisfactory judgment unless they accepted the unsatisfactory judgment as well. That is not the situation in the case at hand, and *Klein* offers no further insight as to whether a deposit with the Court would be proper in this particular case.

3. Amount Deposited

If the Court goes so far as to allow the Defendant to deposit the judgment with the Court, a proper figure will be necessary. Defendant has noted that the Plaintiff is entitled to “10% per annum” “on special damages actually incurred from the date of the occurrence of the act giving rise to the cause of action.” Ut. Code Ann. §§ 15-1-1(2) and 78B-5-824. Defendant then proceeds to figure interest on the special damages award of \$14,472.00 from January 8, 2007, the date Mr. Rawlings obtained new and better employment, through August 21, 2008, the date of the judgment. This is an incorrect figure. Ut. Code Ann. § 78B-5-824 states that interest is to be calculated “*from the date of the occurrence of the act giving rise to the cause of action*” (emphasis added). It was not the Plaintiff’s new employment in January, 2007, that gave rise to the cause of action, it was his termination on February 15, 2006.

Accordingly, the Plaintiff is entitled to 10% simple interest per annum on \$14,472.00 from February 15, 2006, through August 21, 2008, (2 years and 128 days, or 2.35 years) in the amount of \$3,400.92.

If Defendant is allowed to make payment into the Court registry, then, payment should be as follows:

\$18,472.00	Judgment Amount
\$3,400.92	Prejudgment Interest
<u>\$250.29</u>	Post Judgment Interest (as figured by Defendant)
\$22,123.21	Total

CONCLUSION

Due to the pending appeal, this Court does not have the proper jurisdiction to address the Defendant's Motion to Deposit with the Court and therefore the Motion should be dismissed. However, even if the Court chooses to entertain the motion, the purpose of Rule 67 does not allow for a deposit under the current circumstances, and to allow one would potentially compromise the Plaintiff's pending appeal. Even if such deposit were allowed, the amounts proposed by the Defendant are improper and should be adjusted to match the figures shown above.

DATED this 2nd day of December, 2008.

/s/
BRUCE M. FRANSON
Attorney for Plaintiff

Delivery Certificate

I hereby certify that a true and correct copy of the foregoing RESPONSE MEMORANDUM to be served by the method(s) indicated below and addressed to the following on this 2nd day of December, 2008.

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Delivered:

- ☐ U.S. Mail, Postage Prepaid
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- ☐ E-mail
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/s/

BRUCE M. FRANSON
Attorney for Plaintiff